No. 101.

In the Supreme Court of the United States

OCTOBER TERM, 1941

JAMES H. HALLIDAY, A PERSON NON COMPOS MENTIS, BY HIS COMMITTEE, ANNIE HALLIDAY, PETITIONER,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the District Court in overruling the motion for a new trial (R. 44–45) is not reported. The opinion of the United States Circuit Court of Appeals for the Fourth Circuit (R. 51–58) is reported in 116 F. (2d) 812.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 9, 1941 (R. 58). A petition for rehearing was denied March 10, 1941 (R. 64).

The petition for a writ of certiorari was filed May 22, 1941, and was granted October 13, 1941 (R. 66). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Circuit Court of Appeals correctly held that there was no substantial evidence that petitioner was totally permanently disabled while his contract of war risk insurance was in force.

2. If so, whether the Circuit Court of Appeals had power to direct the entry of judgment for the United States and properly exercised that power where no motion was made in the District Court for judgment notwithstanding the verdict, as permitted by Rule 50 (b) of the Federal Rules of Civil Procedure, but the District Court did give post-verdict consideration to the question presented by the Government's motion for a directed verdict in ruling on a motion for a new trial.

3. Whether, in any event, the District Court committed reversible error in ruling that evidence would not be admitted as to the condition of petitioner subsequent to the date (after the insurance expired) on which a county probate court adjudged him to be incompetent, and in instructing the jury that he was to be regarded as totally permanently disabled from that date.

tract of war-risk term insurance. He alleged in his complaint that he was totally permanently disabled on April 2, 1919, the date of his discharge from the military service (R. 1–3). The contract thereafter lapsed but was reinstated on August 1, 1920, and remained in force until October 31, 1920 (R. 10, 51). Accordingly, the issue submitted to the jury was whether petitioner was totally permanently disabled on or before the latter date (R. 41–42, 51).

The Government moved for a directed verdict at the close of the evidence on the ground, among others, that there was no substantial evidence that petitioner was totally permanently disabled while his insurance was in force. The motion was denied (R. 36). The jury returned a verdict for petitioner, finding that he became totally permanently disabled on April 2, 1919 (R 43). The Government made a motion for a new trial (not contained in the record), which was overruled in an opinion disclosing that the sole questions considered by the District Court in so ruling were whether petitioner had made out a case for the jury and, if so, whether there was such a preponderance of evidence in favor of the Government as to require the granting of a new trial (R. 44–45). No other post-verdict motion was made. Judgment for petitioner was entered on the verdict (R. 45–46) and the Government appealed (R. 47). The Circuit Court of Appeals held that there was no substantial evidence that petitioner was

totally permanently disabled while his insurance was in force (R. 51–55) and reversed and remanded with direction to enter judgment for the Government (R. 58).

The Circuit Court of Appeals relied on the provision in Rule 50 (b) for the automatic reservation of the legal question raised by a motion for directed verdict as establishing its power to direct the entry of judgment for the Government. The court also held that the Government's failure to make a motion for judgment notwithstanding the verdict, as permitted by the Rule, did not prevent the court from exercising that power, although "it would have been the course of wisdom" for the Government to have made such a motion. The exercise of the power to direct the entry of judgment, rather than the granting of a new trial, was, the Circuit Court of Appeals indicated, warranted in the instant case in the interest of "the orderly administration of justice" (R. 56–57).

The Circuit Court of Appeals expressed the view, *obiter*, that the District Court had erred in ruling that no evidence would be admitted as to petitioner's condition subsequent to December 9, 1935, the date on which a county probate court had adjudged him to be mentally incompetent. The Circuit Court of Appeals was of the opinion that this adjudication, which was made in an informal and *ex parte* proceeding, was only prima facie evidence of insanity as against one not a party to the proceeding, and, in any event, was

not conclusive evidence of total permanent disability (R. 55–56).

SUMMARY OF ARGUMENT

I

The Circuit Court of Appeals properly held that the Government's motion for a directed verdict should have been granted.

A. There was no substantial evidence to support petitioner's claim of the existence of a total mental disability prior to the expiration of insurance protection on or prior to October 31, 1920. The documentary evidence introduced by petitioner does not support his claim, but to the contrary strongly tends to refute it. It shows that, despite six months of hospital treatment and observation of petitioner in four Government hospitals prior to his discharge on April 3, 1919, and numerous examinations thereafter by Government physicians in connection with claims for compensation and vocational training until as late as 1924, no diagnosis of any mental or nervous disorder was made and no irrational act was noted; that, indeed, as late as 1924 a searching examination resulted in a definite finding that there was no neuropsychiatric disability; that even after a diagnosis of psychoneurosis in November 1925, petitioner was not regarded as incompetent despite repeated neuropsychiatric examinations.

Petitioner was adjudicated incompetent in 1935 for the sole stated purpose of permitting someone

to transact business for him, and, there is no substantial evidence of impairment of business judgment in 1920 or thereafter for many years, at least. Moreover, petitioner was found to be mentally competent after observation in a mental hospital for thirty days in 1936.

The undisputed facts concerning petitioner's activities covering a period beginning prior to October 31, 1920, and extending for many years subsequent to that date, are wholly inconsistent with the existence of the claimed total mental disability. They manifest considerable mental ability on the part of petitioner and reflect both the fact that petitioner could not have been totally disabled (including, as they do, his pursuit for at least two years of a college course in agriculture), and reflect an attitude on the part of others toward him likewise inconsistent with the existence of a total mental disability (including, as they do, the fact that a school teacher married him after an extended courtship and bore him four children).

Petitioner's lay testimony is vague and uncertain, both as to its content of meaning and the periods of time to which it refers. Insofar as it related to the time during which his insurance was in force it was given entirely from memory after a lapse of more than nineteen years. Petitioner's opinion testimony has no probative force because it is without foundation and is opposed to the undisputed facts concerning his activities.

B. Even if petitioner's evidence justified an inference of total mental disability on and after October 31, 1920, there is no substantial evidence of the permanence of such total disability on that date.

Petitioner's only testimony directed to the permanence of total disability was without foundation. Moreover, the failure of petitioner to take hospital or other medical treatment for a mental condition for many years at least after the expiration of insurance protection leaves wholly speculative any inference that such total disability, if it existed, was then permanent and not subject to alleviation or cure.

II

The Circuit Court of Appeals properly directed the entry of judgment in favor of the Government pursuant to its finding that the Government's motion for a directed verdict should have been granted.

A. The facts of this case present no reason why a new trial should be granted. The record reveals no rulings adverse to petitioner preventing full development of his case and there is no claim by him of newly discovered evidence. The verdict was in petitioner's favor and, hence, there was nothing which prejudiced him before the jury. There is nothing to suggest that petitioner's case would be altered in any material respect if a new trial were granted.

B. The direction that judgment be entered in favor of the United States does not defeat any purpose of Rule 50 (b) but, on the contrary, accomplishes all of the purposes of that Rule.

The purpose of the Rule was to make possible a just and speedy termination of litigation and this purpose was served by the mature consideration given to the Government's motion for a directed verdict by the Circuit Court of Appeals.

Also, while the Government did not file a motion for judgment notwithstanding the verdict, it did file a motion for a new trial which in fact resulted in mature reconsideration by the District Court of the question raised by its motion for a directed verdict. Accordingly, a motion for judgment n. o. v. would have invoked no different consideration or have achieved any different result.

C. The direction of the Circuit Court of Appeals that judgment be entered in favor of the United States does not violate any of petitioner's rights under the Seventh Amendment.

The essential steps in the practice existing at common law and preserved by the Seventh Amendment are shown to have been met by the reservation of the question presented by the Government's motion for a directed verdict, the ultimate decision upon the reserved question, and the final disposition of the case directed pursuant to that ultimate decision. Petitioner's contention that an essential step in the common law practice preserved by the Seventh Amendment is reconsid-

eration of the reserved question presented by the Government's motion for a directed verdict by the District Court and that this reconsideration must be invoked by a motion for judgment n. o. v. in order to satisfy the requirements of the Seventh Amendment, is without support in the decisions of this Court, in historical analogy or in logic.

III

The trial court committed reversible error in excluding evidence as to petitioner's condition subsequent to the probate court adjudication that he was incompetent and in charging that he was totally permanently disabled as a matter of law on and after that adjudication.

Assuming that the adjudication was one of insanity, we submit that the ruling and the instruction are opposed to the principle supported by the great weight of authority that such an adjudication is not conclusive as against persons not parties or privies to the lunacy proceeding, even as to the existence of insanity on the date of the adjudication. Moreover, even if the adjudication were to be treated as conclusive evidence of insanity on that date, it may not be regarded as conclusive on the issue of total permanent disability since it did not purport to establish either the degree or the duration of the disability resulting from the insanity.

The ruling and the instruction prejudiced the Government in that it relieved petitioner of the burden of establishing that total disability continued to the date of the trial. The instruction was additionally prejudicial in that it prevented the jury from considering the fact, established by evidence, admitted despite the ruling, that petitioner had been found mentally competent at a Government hospital subsequent to the adjudication.

ARGUMENT

I

THE CIRCUIT COURT OF APPEALS PROPERLY HELD THAT THE GOVERNMENT'S MOTION FOR A DIRECTED VERDICT SHOULD HAVE BEEN GRANTED

It is the theory of petitioner's case that he had a total mental disability on or before October 31, 1920, which was then reasonably certain to continue totally disabling for life.

A. THE EVIDENCE

Petitioner was inducted into the military service June 23, 1918, and was discharged April 2, 1919 (R. 2). He had previously been engaged in farming and had worked part of the time in a dry goods store at a salary of $150 a month (R. 15–16, 26–27). He was hospitalized during his service for an injury to his back and other physical ail-

ments including influenza, tuberculosis, and hyperacidity of the stomach. The symptoms and findings in connection with these diagnoses included nervousness (R. 27–28).[1] The back injury was apparently of slight degree and quickly cured (R. 29–30). The tuberculosis became and remained arrested (R. 18–19, 22, 27–30). The acid condition of the stomach either continued or reappeared and appears to have been responsible for complaints by petitioner and his use of anti-acid remedies after service (R. 5, 17, 20, 21, 25).

A report of examination in December 1918, contains the notation "Nervous system: Reflexes apparently normal. Patient gives impressions of neurasthenia" (R. 28). Although insured was treated for physical ailments in four different hospitals during his service in the Army, there was no diagnosis of any mental or nervous disease and it was found upon examination prior to discharge from the service that he was physically and mentally sound except for tuberculosis and second degree flat feet (R. 29).

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[1] "Any moving causes pain. Physical Examination: Negative, except he is very nervous. Lumbar spine very tender and processes of 2d vertebra seem to be out of line. Erector spinae very tense" (R. 27).

* * * * *

"Feels weak. Slight cough and expectoration. Is nervous, troubled with pain in lumbar region, on moving about. These latter pains are transferred down the legs at times * * *. Looks nervous, but not particularly sick" (R. 28).

Petitioner was examined by Government physicians upon numerous occasions after his separation from service, in connection with claims for compensation and vocational training, and petitioner introduced reports of these examinations made prior to December 9, 1935 (R. 18–22). Two of these examinations were made before the expiration of insurance protection on October 31, 1920, and the reports of neither of them disclosed any mental or nervous disease or any symptom indicative of such disease (R. 18). An examination of February 14, 1921, made several months after the expiration of insurance protection contained a diagnosis of hypocondriasis (R. 18).[2] The report does not disclose the basis for the diagnosis nor does it carry any indication that the "anxiety" indicated by the diagnosis was based on any simulated disease or that it was accompanied by melancholia. It discloses, moreover, the additional diagnoses of arrested tuberculosis, chronic amygdalitis (inflammation of the tonsils) and talipes valgus (club foot with flattening of the plantar arch and of the instep).[3]

Between April 2, 1919, the date of his separation from service, and October 31, 1920, the date of final protection under the insurance contract

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[2] This term is defined in the American Medical Dictionary (Dorland), 16 ed., p. 610, as "Morbid anxiety about the health, often associated with a simulated disease and more or less pronounced melancholia."

[3] See the American Medical Dictionary, pp. 79, 1275.

sued upon, petitioner lived on a farm with his mother and brothers, did farm work (R. 17), courted his future wife (R. 6), and in August 1920, reinstated the insurance which he had allowed to lapse upon his separation from service (R. 10). Petitioner married on April 16, 1921 (R. 5), approximately six months after the expiration of insurance protection in October, 1920. He was pursuing a course of vocational training in agriculture at the time and apparently had been so engaged since some time in 1920 (R. 35). The vocational training had been made available to him by the Government and petitioner was examined periodically by Government physicians during the course of his training. After the examination of February 14, 1921, petitioner is shown to have received five examinations prior to the completion of his studies and in none of the reports of these examinations is there any indication of mental or nervous disease (R. 18–19).

Petitioner did not call as witnesses any of his instructors during the period of his vocational training, nor did he introduce any of the training records. Petitioner's wife testified that he "did not go to school every day" and "was in the hospital part of the time" (R. 6), but petitioner, who apparently began his training at a vocational training school at a soldier's home (R. 35), is shown, by the wife's testimony, to have been given instruction thereafter at Waynesville, North Caro-

lina, and finally to have been granted a two-year course at Athens, Georgia (R. 6), apparently at the University of Georgia (R. 44).

The first two examination reports (R. 19) rendered subsequent to petitioner's vocational training (September 30 and December 17, 1924), contained no indication of any mental or nervous disease and the second of these reports contained definite findings that there was "no history or evidence of any psychosis" and "No N. P. [neuropsychiatric] Disability." In the latter report, which was made by a board of physicians, it was stated (R. 19): "Mental examination: Patient answers questions readily and accurately. Orientation and memory good. Insight and judgment good. There is no history or evidence of any psychosis."

In 1924 petitioner rented a fifty-acre farm from a doctor, where he remained for two years, and thereafter purchased a farm twenty-three acres larger, on which he was living with his family at the time of the trial (R. 7).

In July 1925, petitioner applied to an insurance company for a policy of life insurance with provision for total permanent disability benefits (R. 31–32), stating in his application that his health was good (R. 32). Petitioner disclosed in the application that he had suffered an injury to his back during military service and that the Government had paid him compensation of $40 per month during the past two years and during the three

years prior thereto had paid him $145 per month.[4] He withheld information, however, that he had been treated in service for influenza and tuberculosis (R. 31).[5]

Although the physician who represented the insurance company testified that a person can very often conceal mental abnormality (R. 33) he stated in his report that he did not "discover upon examination or inquiry any evidence of disease or functional derangement, past or present, of the brain or nervous system" (R. 32), and he testified that if there had been anything noticeable in petitioner's conduct "from a mental or nervous standpoint" he would have noted it in his

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[4] Although not so described in the application, this sum was vocational training pay. The amount received by petitioner—$145 per month—was the allowance for a trainee who, like petitioner (R. 6), had a wife and one child. See Veterans' Bureau General Order No. 150, November 21, 1921, Regulations & Procedure, United States Veterans' Bureau (1930), Part I, pp. 533, 545–546. It may be noted that the amount of vocational training pay bore no relationship to the degree of the trainee's disability but was governed by the number and relationship of persons dependent upon him and local living costs.

[5] Petitioner thus admitted facts which could have been ascertained by the insurance company from the Veterans' Bureau and concealed pertinent facts which could not have been so ascertained. Information contained in the files of the Veterans' Bureau relating to an individual claimant is confidential except as to the amount of compensation and vocational training pay. (See World War Veterans' Act, June 7, 1924, c. 320, sec. 30, 43 Stat. 607, 615, 38 U. S. C., sec. 456.)

report (R. 30). The company issued a policy but it was "rated up" and contained no disability provision, and petitioner did not accept it (R. 34–35).[6]

The report of examination of petitioner by Government doctors on November 24, 1925 (R. 19) contained the first diagnosis of psychoneurosis.[7] The report did not state whether the condition was moderate or severe at that time, but four of the next six examination reports (R. 19–22), the last of which was made on April 11, 1935,[8] characterized petitioner's neuropsychiatric condition as being of moderate degree and none characterized it as severe. Moreover, petitioner's medical witness gave as the sole reason for the adjudication of incompetence in December 1935, his opinion that petitioner should have someone to

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[6] Petitioner's disclosure of the fact of compensation payments made to him over a considerable period of time provides a sufficient explanation of the failure of the company to grant standard premium rates or disability protection, despite the implication in petitioner's application that such payments were made for an old back injury of which the company's medical examiner could find no evidence, and the fact that no other disability was found (R. 30).

[7] Psychoneurosis is defined in the American Medical Dictionary, pp. 1052–1053, as "any one of a group of borderline disorders of the mind which are not true insanities. The term includes hysteria, neurasthenia, and psychasthenia."

[8] Reports dated December 18, 1935, and June 30, 1936, were excluded under the trial court's ruling that no evidence could be introduced covering the period subsequent to the adjudication by the probate court on December 9, 1935, that petitioner was mentally incompetent (R. 7–11, 22).

transact business for him (R. 24),[9] and in 1936 Government physicians at Roanoke, Virginia, in the one mental hospital in which petitioner was a patient (R. 7), regarded him as mentally competent (R. 26) after an observation of about thirty days (R. 7).

Petitioner, at least during the period from the spring of 1925 through 1927, attended church regularly and was subject to church "dues" (R. 11–12). According to the testimony of one of his witnesses, he showed no signs of not being able to get along with his neighbors and fellow church members until after 1927 (R. 12–13).

Petitioner, according to his wife, converted $3,000 of his war-risk insurance into a policy of Government life insurance in 1927 (R. 6). Since the insurance had lapsed in 1920 (R. 10), the conversion in 1927 presumably occurred only after reinstatement, which required proof satisfactory to the Director that the insured was, at least, not totally permanently disabled.[10] Moreover, petitioner himself filed claim under the contract sued upon. It was filed June 22, 1931 (R. 4), and a committee was not appointed until December 9, 1935 (R. 7). The claim was filed just eleven days prior to the

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[9] There is no testimony directly relating to petitioner's business judgment prior to 1935. His activities between 1919 and 1931 appear not to reflect any impairment of business judgment over that period.

[10] Section 304, World War Veterans' Act, 1924, as amended, 38 U. S. C., sec. 515.

expiration of the limitation on suits on such claims.[11]

One of petitioner's seven lay witnesses regarded him as peculiar and testified that he had difficulties with his neighbors, but this witness first met petitioner in 1925 or 1926 (R. 12). Moreover, it appears through this witness that petitioner farmed regularly until about five years prior to the trial (R. 13) that is until about 1933 (R. 4), and got along with his neighbors without difficulty until 1927, at least (R. 12–13).

Another lay witness had known petitioner all of his life and testified that he was "highly nervous" after service, but fixed the beginning of that nervous condition as ten or twelve years before the trial (R. 14–15), that is, in 1927 or 1929 (R. 4).

The postmaster at Iva, South Carolina, testified that he had seen petitioner "fairly regularly" after service; that petitioner was nervous and "seemed" not to have a grip on himself (R. 16) and "seemed" to complain about his condition (R. 17), but the witness also testified that he had not seen petitioner for the past several years, and prior thereto had seen him "once or twice a year" (R. 16); that he "just met him and his brothers as they passed through Iva * * * and stopped"; that "he could not be sure" as to when petitioner took vocational training and couldn't "recall * * * very clearly" whether peti-

[11] Section 19, World War Veterans' Act, 1924, as amended, 38 U. S. C., sec. 445.

tioner was more talkative after the war than before (R. 17).

A druggist testified that "after he returned" petitioner seemed to be a "changed man" and to find fault with former friends; that he "has been" mad at the witness many times; that he "argues" about his condition; "is" and "has been" in bad shape; "is" always wanting some new medicine and "complains" about his physical condition (R. 16–17). But he did not testify to any irrational act on the part of petitioner and, except for the general statement that it was after petitioner returned, the witness did not specify the periods of time to which any portion of his testimony related.

A brother who lived on a farm with him for a time after petitioner's service, testified that petitioner was nervous and complained of his stomach, talked about the war continually and "couldn't agree" with the witness as he had done before the war; that petitioner was a "physical wreck" and "not able to make a full week" (R. 17). Another brother expressed the opinion that petitioner was a "complete physical and mental wreck, very badly torn up physically and mentally," but, in support of that opinion testified merely that since petitioner's service he had not "seen" him "do any successful work," and that petitioner, in contrast to the witness, wanted to talk about the war continually and was sometimes mad and sometimes in good humor toward the

witness, who, however, was always in good humor toward petitioner (R. 27). Neither of the brothers nor any of petitioner's witnesses testified to any irrational act or manifestation of lack of memory, orientation, or even business judgment on the part of petitioner occurring within the period of insurance protection, or, except for petitioner's wife, at any time even subsequent to the expiration of insurance protection.

The lay witness whose testimony most impressed the District Court (R. 44) was petitioner's wife. She testified that petitioner was suspicious of everybody; that he was "far from well" and complained of his physical condition; that as a result of trying to work on the farm he became "more" nervous; couldn't sleep or retain his food; that he was afraid of being poisoned; threatened to commit suicide and to kill her and the children (R. 5); but the only portion of this testimony specifically related to the period of insurance protection was that petitioner had been suspicious of everybody since his discharge from service (R. 5). The remainder was either specifically or impliedly related to periods of time subsequent to the expiration of insurance protection.

Moreover, her own testimony shows that she was a school teacher living with her mother when she married petitioner after an extended courtship; that she bore him four children (R. 6); that for many years subsequent to 1920, petitioner engaged in such mentally normal activities

as that of pursuing studies in agriculture, renting a farm, purchasing a farm (R. 7), executing an application for insurance with a private company (R. 6), and taking requisite action to protect his rights in connection with Government insurance, including the conversion (and, presumably, the reinstatement) of a portion thereof (R. 6, 10). Her testimony further discloses that, while petitioner was adjudicated incompetent, this did not occur until 1935, and that he was first sent to a mental hospital in 1936 (R. 7).

Petitioner's only medical witness was a Dr. Land who did not "profess to be a mental expert" (R. 24). While Dr. Land's testimony on direct examination clearly implies that he had been petitioner's family physician since a date prior to petitioner's military service;[12] that he had examined petitioner in 1919, finding "at that time" a mental condition which he diagnosed then and

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[12] On direct examination:

"I was the family physician of the Halliday family, and have known James H. Halliday since he was a little tot" (R. 22).

On cross examination:

"As to whether I was ever really the plaintiff's family physician, yes sir.

Q. When?

A. Since about six years ago" (R. 23).

The District Court gained the impression that Dr. Land had "testified that * * * he had been the physician of his (petitioner's) family before the war" (R. 44). There is no testimony bearing on the date as of which Dr. Land became the family physician except the quoted portions of his testimony on direct examination and cross examination.

still regards as psychoneurosis (R. 22),[13] and he expressed or implied opinions that any work by petitioner subsequent to his discharge would have resulted in a "complete collapse mentally and physically" (R. 23),[14] Dr. Land's testimony on cross examination shows that he did not really become petitioner's family physician until "1932 or 1933";[12] that in fact he first examined petitioner "professionally" at that time (R. 25);[13] and that while he regarded conversation as a sufficient basis for expressing an opinion about petitioner's mental condition, and had seen petitioner "on the street or in a drug store" (R. 24), probably two or three times a year "all the way from 1919" (R. 25), he could not (in reply to a question as to whether he had seen petitioner at all during the first four years after his discharge from the

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[12] See footnote on p. 23.

[13] On direct examination:

"He was a very bright boy before he went into the Army. I came in contact with him in 1919. As to what I know about the boy physically and mentally, from the time he was discharged from the Army up until December 1935, well I found that he had an arrested case of tuberculosis, he had some arthritis, and he had a mental condition which I thought at the time, and still think, was a psychoneurosis" (R. 22).

On cross examination:

"I really don't know whether Dr. Webb at Townville was his physician prior to [1933], or who was his physician. I have only been his physician since about six years ago, and from 1919 to that time was not really his physician, and for that period I really don't know anything professionally about him, except from observation. I did not examine him physically until about six years ago" (R. 23).

Army) say "that I had seen him at any stated time" (R. 24).[14]

Dr. Land, who regarded psychoneurosis and hypocondriasis as "practically the same thing" (R. 25), and the former condition as one "which makes a man think he has everything the matter with him" (R. 22),[15] testified [as the apparent basis for his opinion formed, without "professional" examination, that petitioner had psychoneurosis some six years before the first diagnosis of that condition by Government physicians who were examining him periodically (R. 18, 19)] that petitioner was always complaining. He did not

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[14] On direct examination:

"I would not have advised him to do any work, since he has been out of the Army. I think it would have been harmful to him. If he had just been put to work I think he would have a complete collapse, mentally and physically. He is not physically in good shape, and is mentally in bad shape. When he got out of the Army I didn't hold any hope for his recovery, a man in his condition will go from bad to worse. I think he has gradually progressed since he came out of the Army." (R. 23.)

On cross examination:

"Q. * * * Now, during the first four years after his discharge from the Army, when he was taking vocational training most of the time, would you say you had seen him at all during that period?

A. During what period?

Q. The period he was taking vocational training. He was at Waynesville during that time and at Athens, Georgia, and you were here in Anderson practicing medicine?

A. I couldn't say that I had seen him at any stated time." (R. 24.)

[15] Cf., however, the definitions in footnotes 2 and 7, supra, pp. 14, 18.

specify, however, any complaints by the petitioner other than those relating to his stomach[16] and admitted that upon his first examination of petitioner "he seemed to have hyperacidity and I gave him something for that. That is a condition of the stomach" (R. 25). Moreover, there was no lay testimony as to complaints by petitioner relative to any condition other than his stomach, except the testimony of petitioner's wife with respect to a period subsequent to the expiration of insurance protection (R. 6), and it appears possibly significant that the hyperacidity with which petitioner was afflicted in 1932 had also troubled him in 1918 (R. 28), and that the continuance or periodic recurrence of that condition could account both for petitioner's complaints of stomach distress and his use of milk of magnesia (R. 17) and soda (R. 20).

B. DISCUSSION

1. *There is no substantial evidence to support petitioner's claim of a total mental disability prior to October 31, 1920*

The documentary evidence introduced by petitioner does not support his claim of a total mental disability on or prior to October 31, 1920, but to the contrary strongly tends to refute it.

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[16] The doctor testified in this connection: "He always wanted me to do something for him; could I give him something for his stomach; could I do this and that and the other" (R. 25).

Petitioner's documentary evidence relating to his military service shows that in connection with physical ailments temporarily disabling to a total degree, he was found to be nervous, and that, during the same period a physician observed of him that he "gives impressions of neurasthenia." But no single irrational act was recorded upon his service medical record and no diagnosis of mental or nervous disability was made, despite six months of hospital treatment and observation in four service hospitals. And no mental or nervous disability was noted upon petitioner's examination at discharge.

None of the many Government physicians who examined him upon numerous occasions subsequent to discharge (in connection with his claim for compensation and vocational training) ever reported an opinion that he was incompetent and, during the period of insurance protection, none of them made any diagnosis or reported any findings at all indicative of any mental or nervous disorder of any character. Furthermore, as late as 1924, long after the expiration of insurance protection, petitioner's own evidence shows a searching examination in which no neuropsychiatric disability was found and it was reported "There is no history or evidence of any psychosis."

We submit that petitioner's documentary medical evidence, covering a period of more than six years beginning prior to and continuing long after

the date of alleged mental disability, is inconsistent with the existence of *any* such disability, and that it wholly precludes a finding of *total* mental disability. It is not at all credible that petitioner could have had a total mental disability over so extended a period and yet have been able to conceal from so many persons skilled in medical science even the existence of mental disorder.[17]

Indeed, Government physicians who, in November 1925, made the first diagnosis of psychoneurosis based on a "professional" examination, have *never* regarded petitioner as incompetent despite repeated detailed examinations made in the light of that diagnosis, including observation in a mental hospital over a period of thirty days in 1936.

Moreover, Dr. Land, who became petitioner's family physician in 1932 or 1933, did not procure an adjudication that he was incompetent until December 1935. This action was taken at that time merely to permit someone to transact business for him. There is no evidence, documentary or oral, factual or opinion, that petitioner had manifested any impairment of business judgment prior to 1935.

The inference that petitioner could not have had a total mental disability on October 31, 1920, or,

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[17] Cf. *United States* v. *Brown*, 76 F. (2d) 352, 354 (C. C. A. 1); *United States* v. *Earwood*, 76 F. (2d) 557, 559 (C. C. A. 5), certiorari denied, 295 U. S. 762; *United States* v. *Taylor*, 87 F. (2d) 994, 995 (C. C. A. 5).

indeed, for many years thereafter, at least, which we believe to be required by his own documentary medical evidence, is also fully supported by undisputed facts, including those disclosed by other documentary evidence relating to the activities of petitioner subsequent to the date of claimed total disability. Thus, petitioner reinstated his Government insurance on August 1, 1920; successfully prosecuted, prior to 1921, claims for compensation and vocational training on the basis of partial physical disability; married in 1921 a school teacher, who bore him four children; pursued studies in agriculture between 1920 and 1924; rented a farm in 1924 and 1925; purchased a larger farm in 1925 (apparently on time payments); negotiated in 1925 with an insurance company for a $3,000 contract of life and disability insurance (manifesting in those negotiations an apparently detailed knowledge of legislation pertaining to veterans); refused the policy proffered to him, apparently for the sole reason that it did not contain the exact terms and conditions for which he had applied; converted in 1927 (presumably after earlier reinstatement) a Government policy in like amount and containing comparable provisions to those he had sought from the insurance company, which policy was kept in force by premium payments to the date of trial; and filed claim on his original $10,000 contract of Government insurance just eleven days prior to the expiration of the limitation on suit upon such claim. Such activities have been recognized in

numerous cases as being inconsistent with the existence of total disability as the result of a mental disease or from any cause.[18]

The lay testimony offered in support of petitioner's claim of a total mental disability prior to October 31, 1920, was vague and uncertain both as to its content of meaning and the periods of time to which it referred and has no substantial tendency to support the claim. It is wholly consistent with the view, indicated by the documentary medical evidence and the undisputed facts as to his activities and the conduct of others toward him, that, prior to October 31, 1920, and for some years thereafter, at least, petitioner was without mental disability, albeit of an unattractive personality and an unfriendly disposition. Giving to the testimony that petitioner was unfriendly and quarrelsome; that he was complaining of stomach distress and of "this and that and the other" and taking milk of magnesia and other remedies for it; that he was suspicious of every-

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[18] *Lumbra* v. *United States*, 290 U. S. 551, 560–561; *United States* v. *Spaulding*, 293 U. S. 498, 505; *United States* v. *Fain*, 103 F. (2d) 161, 164; 119 F. (2d) 208 (C. C. A. 8), certiorari denied, No. 570, October Term, 1941 (unreported); *United States* v. *Adcock*, 69 F. (2d) 959 (C. C. A. 6); *United States* v. *Hodges*, 74 F. (2d) 617, 618 (C. C. A. 6); *Denny* v. *United States*, 103 F. (2d) 960, 961, 964 (C. C. A. 7); *Grant* v. *United States*, 74 F. (2d) 302 (C. C. A. 5), certiorari denied, 295 U. S. 735; *United States* v. *Jones*, 74 F. (2d) 986 (C. C. A. 5); *United States* v. *Braden*, 92 F. (2d) 682, 684 (C. C. A. 6); *United States* v. *Russian*, 73 F. (2d) 363, 365 (C. C. A. 3).

body, and that he talked excessively about the war, all of the probative value to which, standing alone, it might possibly be entitled, we submit that it fails to meet the indispensable requirement of establishing that petitioner was totally disabled. See *United States* v. *Cochron*, 63 F. (2d) 61, 62 (C. C. A. 10), in which it was said, of far stronger evidence, that it could not be accepted as showing total permanent disability "unless we substitute for insanity in fact a predisposition to insanity. Total and permanent disability are plain, simple words; they must be accepted in their common, practical sense; they mean that the disability of mind or body is such as to render it impossible for the sufferer to follow continuously any substantially gainful occupation."[19]

Additionally, petitioner's lay testimony (as well as that of his single medical witness) was given entirely from memory more than nineteen years after the expiration of insurance protection, and thus more than nineteen years after the period to which most of it was necessarily directed. The courts have recognized that conditions presently or recently existing always color the distant past in the recollections of a memory unaided by contemporaneous records, and hence that testimony in such cases has little, if any, probative value because

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[19] *United States* v. *Brown*, 76 F. (2d) 352, 354 (C. C. A. 1st); *United States* v. *Braden*, 92 F. (2d) 682, 684 (C. C. A. 6th); *United States* v. *Kiles*, 70 F. (2d) 880, 883 (C. C. A. 8th); *Gilmore* v. *United States*, 93 F. (2d) 774, 777 (C. C. A. 5th), certiorari denied, 304 U. S. 569.

"telescoped * * * by time" and colored by the more vivid memories of recent years.[20]

The opinion testimony in support of petitioner's claim has no probative force because it is without foundation and is opposed to the undisputed facts. A brother testified that petitioner was "a mental and physical wreck" and Dr. Land testified that "if he had just been put to work I think he would have a complete collapse mentally and physically." It is noteworthy that each of these witnesses joined his sweeping expression of opinion as to petitioner's mental condition with an equally sweeping expression of opinion as to petitioner's physical condition, although the one was obviously unqualified by training, and the other, while qualified by training, admittedly did not, prior to 1932 or 1933, make the examination requisite to the formulation of an opinion concerning petitioner's physical condition.

Dr. Land's expression of opinion with respect to petitioner's mental condition in 1919 or 1920 was without probative force because he was unable to say that he had seen him "at any stated time" and "never paid any attention to him" when he did see him. Also, the principal basis for Dr. Land's opinion was the fact that when he did see him, petitioner complained of his stomach

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[20] *Cunningham* v. *United States*, 67 F. (2d) 714, 715 (C. C. A. 5); *United States* v. *Earwood*, 76 F. (2d) 557, 559 (C. C. A. 5), certiorari denied, 295 U. S. 762; *United States* v. *Brown*, 76 F. (2d) 352, 354 (C. C. A. 1).

and "this and that and the other," which the physician appears to have assumed represented complaints of a purely imaginary ailment. However, when Dr. Land examined petitioner in 1932 or 1933, he found a physical explanation for the complaints. The only other basis suggested by the physician for his opinion was his testimony that petitioner thought neighbors were "double-crossing" him, but the witness did not specify the dates upon which petitioner manifested this symptom of mental upset. No basis whatever was shown for the brother's opinion that petitioner was a mental wreck nor did the brother disclose the meaning which he meant to convey by this vague expression—which would be consistent with a purely passing emotional upset. The courts have recognized that verdicts may not rest on speculation, conjecture, and surmise,[21] and the rule applies with equal force to opinion testimony.[22]

The opinions of these witnesses are also wholly opposed to the undisputed physical facts. A per-

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[21] *Gunning* v. *Cooley*, 281 U. S. 90, 93; *Stevens* v. *The White City*, 285 U. S. 195, 203-204; *Penna. R. Co.* v. *Chamberlain*, 288 U. S. 333, 344; *United States* v. *Fain*, 103 F. (2d) 161, 163 (C. C. A. 8th); *United States* v. *Mintz*, 73 F. (2d) 457, 459 (C. C. A. 5th); *United States* v. *Hodges*, 74 F. (2d) 617, 618 (C. C. A. 6th).

[22] *United States* v. *Spaulding*, 293 U. S. 498, 506; *United States* v. *Doublehead*, 70 F. (2d) 91, 92 (C. C. A. 10th); *United States* v. *Howard*, 64 F. (2d) 533, 534-535 (C. C. A. 5th); *United States* v. *Meltcritt*, 90 F. (2d) 592, 595 (C. C. A. 2d); *United States* v. *Braden*, 92 F. (2d) 682, 684 (C. C. A. 6th); *United States* v. *West*, 78 F. (2d) 785, 786 (C. C. A. 10th).

son who was a "mental wreck" and unable to work without a complete mental collapse could not possibly have engaged in the numerous activities in which petitioner did engage subsequent to his discharge from service and the lapse of his insurance, nor could he have concealed his condition for so many years from the numerous physicians who examined him, the instructors who taught him, and the neighbors who transacted business with him. It has been recognized that "opinion testimony rises no higher than the level of the logic and the facts on which it is based" (*United States* v. *Hill*, 62 F. (2d) 1022 (C. C. A. 8)) and that "opinion testimony opposed to the physical facts is without probative value."[23]

Moreover, it is quite clear that petitioner's medical witness, concededly not a mental expert, confused a mental disorder (itself not representing a true insanity), with which the Government doctors found petitioner to be afflicted in 1928 and thereafter, with an altogether different condition (sometimes but not necessarily associated with mental disorder), which a Government physician had noted shortly after the

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[23] *United States* v. *Spaulding*, 293 U. S. 498, 506; *Eggen* v. *United States*, 58 F. (2d) 618, 621 (C. C. A. 8th); *United States* v. *Becker*, 86 F. (2d) 818, 820 (C. C. A. 7th); *United States* v. *Thornburgh*, 111 F. (2d) 278, 280 (C. C. A. 8th), certiorari denied, 311 U. S. 604; *Stephenson* v. *United States*, 78 F. (2d) 355, 357 (C. C. A. 8th); *United States* v. *Melbeitt*, 90 F. (2d) 592, 595 (C. C. A. 2nd); *United States* v. *Rakich*, 90 F. (2d) 137, 138 (C. C. A. 8th).

expiration of insurance protection, and thus added the prestige of medical opinion to the effort to relate a recognized mental condition to a period prior to its actual manifestation.

2. *There is no substantial evidence of the permanence of total disability on October 31, 1920, if total disability be assumed to have then existed*

It is well established that there can be no recovery under a contract of war-risk insurance unless a total disability existing during the life of the insurance contract is shown to have become permanent prior to the expiration of insurance protection. Mere permanence of a disability is not enough; it is permanence of totality of disability that is required.[24]

In this case there is no substantial evidence of the permanence of any total disability which might be assumed to have existed on October 31, 1920. Petitioner's only testimony directed to that phase of the case was the testimony of Dr. Land that "when he [petitioner] got out of the Army I didn't hold any hope for his recovery", and that it was his prognosis "back in 1919" that he did not "think he would recover", but, as has been shown (*supra*, pp. 32–34), Dr. Land had no foundation for the expression of any opinion

[24] *United States* v. *Spaulding*, 293 U. S. 498, 504-505; *United States* v. *Gwin*, 68 F. (2d) 124, 126 (C. C. A. 6th); *Poole* v. *United States*, 65 F. (2d) 795 (C. C. A. 4th), certiorari denied, 291 U. S. 658; *United States* v. *Crume*, 54 F. (2d) 556 (C. C. A. 5th).

whatever with respect to the condition of petitioner as early as 1919 or 1920.

Additionally petitioner never received hospital or other medical treatment for any mental condition. He did not even enter a hospital for mental observation until 1936. It has been recognized in numerous cases that neglect or failure to take treatment for a total disability until the condition has become permanent precludes a claim that the total disability was permanent from its inception.[28]

This rule is not in any sense a penalty imposed upon any insured. It is a rule based upon the provisions of the insurance contract requiring certainty of the continuance for life of a total disability before the contract may be regarded as having matured. It merely reflects recognition that in the absence of evidence that treatment has been tried and found unsuccessful, permanence of disability is speculative.

The suggestion in petitioner's brief (pp. 17–22) that the rule should not be applied to mental cases is illogical. Where proof of permanence is lacking a contract of war risk insurance is obvi-

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[28] *Falbo* v. *United States*, 64 F. (2d) 948 (C. C. A. 9th), affirmed *per curiam*, 291 U. S. 646; *United States* v. *Kentfrow*, 60 F. (2d) 488, 489 (C. C. A. 10th); *Earwood* v. *United States*, 90 F. (2d) 494 (C. C. A. 5th), certiorari denied, 302 U. S. 720; *Eggen* v. *United States*, 58 F. (2d) 616, 620 (C. C. A. 8th); *United States* v. *Clapp*, 63 F. (2d) 793, 795 (C. C. A. 2d); *Connelly* v. *United States* (C. C. A. 5th), decided October 30, 1941, not yet reported.

ously not matured, even though a total mental disability exists. Moreover, Congress has provided protection for persons totally disabled as the result of a mental condition, not by waiving the contract provisions, as petitioner in effect appears to suggest, but, in specified circumstances, by waiving the payment of premiums so that the contract itself is continued in force. (See Section 306, subsection c, World War Veterans' Act, 1924, as amended, 38 U. S. C. 517.)[26]

Petitioner relies upon the adjudication of incompetency as bearing on the question of his total permanent disability (Br. p. 20), but this adjudication having been made in 1935, obviously has no tendency to establish either a total or a permanent disability in 1920, or indeed the existence of any mental incapacity at that time.

The long delay in the assertion before the Veterans Administration of the claim (R. 4) that petitioner was totally permanently disabled in

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[26] Petitioner asserts that the Government denied him hospital treatment, and refers in this connection to certain testimony of Dr. Land relating to the year 1937 (Br. p. 17), but petitioner assumed the burden of showing a total mental disability on October 31, 1920, which was then permanent. Prior to 1935, the obvious reason why no treatment for a mental condition was given to petitioner by the Government, was that no such condition was found by Government physicians. The reason why no such treatment was given or sought from 1925 to 1936, is disclosed by the testimony of the wife that petitioner did not want to go to a mental hospital (R. 7).

1920 is strong evidence against its validity.[27] The testimony of petitioner's wife that she did not know of the right "to sue" (R. 6) has no tendency to explain the non-assertion of claim.

We accordingly submit that the Circuit Court of Appeals correctly held that there was no substantial evidence of total permanent disability prior to the expiration of insurance protection.

II

THE CIRCUIT COURT OF APPEALS PROPERLY DIRECTED THE ENTRY OF JUDGMENT IN FAVOR OF THE UNITED STATES

Petitioner contends that the Circuit Court of Appeals was without the power to direct the entry of judgment against him because the Government did not file a motion for judgment notwithstanding the verdict in accordance with Rule 50 (b) of the Federal Rules of Civil Procedure (*supra*, pp. 3–4) (Br. 24–26). He asserts that absent that motion, the Circuit Court of Appeals could only direct that a new trial be given. We submit, however, that the action of the Court of Appeals was proper under the facts of this case, that it fulfills all of the purposes of Rule 50 (b), and that it does not, as petitioner contends, contravene the provisions of the Seventh Amendment.

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[27] *Lumbra* v. *United States*, 290 U. S. 551, 560; *Miller* v. *United States*, 294 U. S. 435; *United States* v. *McCoy*, 73 F. (2d) 786, 787 (C. C. A. 5th); *United States* v. *La Favor*, 96 F. (2d) 425, 429 (C. C. A. 9th).

A. *The proper disposition of this case does not call for a new trial.*—There is no reason to suppose that petitioner's case could be altered in any material respect in the event of a new trial. Presumably he adduced all of the evidence he could muster in support of his claim; if he did not, his failure to do so affords no basis for granting a new trial. The record does not disclose any rulings upon the evidence preventing the full development of petitioner's case and he did not in the Circuit Court of Appeals, either upon the hearing of the appeal or in his petition for rehearing (R. 59–64), and does not now in this Court, suggest that any such rulings were made. He did not in the Circuit Court of Appeals, and does not here, suggest the existence of any newly discovered evidence. He cannot claim that his case was prejudiced before the jury as the result of instructions or in any other manner during the course of the trial, since the jury found in his favor.

Consequently, so far as the facts of this case are concerned, there is no reason why a new trial should be granted. On the contrary, the United States and, for that matter, petitioner himself, should be saved the expense of a new trial, and the direction of the Circuit Court of Appeals that judgment be entered in favor of the United States should be sustained, unless other considerations than the disposition of this case alone require other action. We submit that such considerations do not exist.

B. *The direction that judgment be entered in favor of the United States does not defeat any purpose of Rule 50 (b) but, on the contrary, accomplishes all of the purposes of that rule.*—The purpose of the Rule was to make possible a just and speedy termination of litigation.[28] The provision for the permissible filing within ten days after verdict of a motion for judgment notwithstanding the verdict was obviously designed to accomplish this purpose by eliciting more mature consideration of the question presented by the motion for a directed verdict than is sometimes possible in the course of a trial. And we submit that where, as here, mature consideration has been given to the question presented by the Government's motion for a directed verdict and it has been determined that a just and speedy termination of litigation requires the entry of judgment in favor of the United States, it is immaterial that the mature consideration leading to that conclusion was obtained by other means than the filing of a motion for judgment notwithstanding the verdict. We submit that the controlling factor is the fact that mature consideration has been given (a) in the reviewing courts,[29] and (b) even in

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[28] *Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243, 250.

[29] By analogy to the practice at common law, it would appear that the question automatically reserved should not

the District Court, albeit not as a result of a motion for judgment notwithstanding the verdict.

The purpose of achieving a speedy as well as a just termination of litigation would be defeated if it were held that the Circuit Court of Appeals is without the power to direct the entry of judgment in an appropriate case merely because the District Court was not required to consider the question which, at the trial, was reserved for later decision. It is assumed that, of course, the District Court has the power to consider the reserved question even in the absence of any post-verdict motion.[30]

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be regarded as solely, or even primarily, for decision by the District Court. The practice at common law contemplated that the reserved ruling would be considered not at *nisi prius* but by the court *en banc*, as a part of the issues included in the customary rule *nisi*. See the discussion of Lord Blackburn in *Dublin, Wicklow & Wexford Ry. Co.* v. *Slattery*, L. R. 3 A. C. 1155, 1204–1205; Thayer, *Evidence*, 241–244; Tidd, *Practice* (London 1850), II, 904–905. See also American Bar Association Proceedings Re Federal Rules of Civil Procedure (Washington & New York), p. 126.

[30] Unless this is true, the net result of Rule 50 (b), contrary to its undoubted purpose, would likely be to decrease rather than increase the consideration given to a motion for a directed verdict in many cases. Presumably many cases are now presented to the jury with less consideration of the question presented by a motion for a directed verdict than would have been given except for the reservation of the question for later decision, as provided by Rule 50 (b). If the District Court does have the power to reconsider the reserved question *sua sponte* he may, of course, call for briefs and oral argument if he desires them. Cf. American Bar Association Proceedings Re Federal Rules of Civil Procedure (Washington & New York), p. 126.

Undoubtedly, Rule 50 (b) contemplates that the mature consideration of the question presented by a motion for a directed verdict, which is made possible by the automatic reservation, will be given in the first instance by the District Court; nor is it arguable, we think, that the orderly administration of justice ordinarily would best be served when such post-verdict consideration is given to a motion for a directed verdict by the District Court in the first instance. But, we submit, other means should be found to insure such consideration in an appropriate case than to limit the power of reviewing courts to direct the entry of judgment where such action is found necessary after mature consideration to accomplish a just and speedy termination of the litigation.[31]

In any event, so far as this particular case is concerned, the purpose of Rule 50 (b) has been served in all respects. The District Court reconsidered the precise question originally presented

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[31] One such means, perhaps, would be for the reviewing courts to assess the costs of appeal upon the successful appellant in cases in which the motion for judgment was not made in the District Court. Such action would appear particularly appropriate in view of the possibility that the making of the motion might have resulted in the District Court reaching, upon mature reflection, the same conclusion as the reviewing court, with the further possible effect that the expenses of appeal would have been saved. The power of the reviewing courts to make such an assessment of costs appears clear. See Rule 21, Revised Rules of the Circuit Court of Appeals for the Fourth Circuit; Rule 32, Revised Rules of this Court.

by the Government's motion for a directed verdict in passing upon its motion for a new trial, and reached the conclusion, stated in its memorandum order denying that motion, that "there was ample evidence to go to the jury." (R. 44.) The fact that the District Court's consideration of that question was invoked by a motion for a new trial is, we submit, a matter of no consequence. There is obviously no reason to suppose that any more mature consideration would have been invoked or any different conclusion reached had a motion for judgment been filed.

In summary, we submit that the purposes of Rule 50 (b) have been served in all respects; mature consideration of the reserved question was given in the Circuit Court of Appeals and the question is now before this Court; even if reconsideration of the reserved question by the District Court is a *sine qua non* to the power of a reviewing court to direct the entry of a judgment, such reconsideration has been accorded; and the purpose of Rule 50 (b), of making possible a just and speedy termination of litigation, may be defeated in this or any other like case unless the power of the Circuit Court of Appeals to direct judgment n. o. v. for the United States is sustained.

C. *The direction of the Circuit Court of Appeals that judgment be entered in favor of the United States does not violate any of petitioner's rights under the Seventh Amendment.*—We sub-

mit that the decisions of this Court make clear that under the facts of this case there is no merit in petitioner's contention that the direction of the Circuit Court of Appeals to enter judgment for the United States violates his rights under the Seventh Amendment to the Constitution. In *Baltimore & C. Line* v. *Redman*, 295 U. S. 654, 659, it was stated:

> At common law there was a well established practice of reserving questions of law arising during trials by jury and of taking verdicts subject to the ultimate ruling on the questions reserved; and under this practice the reservation carried with it authority to make such ultimate disposition of the case as might be made essential by the ruling under the reservation, such as nonsuiting the plaintiff where he had obtained a verdict, entering a verdict or judgment for one party where the jury had given a verdict for the other, or making other essential adjustments.

The essential steps in the practice existing in common law and preserved by the Seventh Amendment are thus shown to have been (1) the reservation of the question, (2) the ultimate decision upon the reserved question, and (3) the final disposition of the case pursuant to the decision. Here (1) the Government moved for a directed verdict (R. 36), (2) the motion was denied (R. 36), and thus automatically reserved for subsequent decision under Rule 50 (b), and (3) the ultimate decision upon the reserved question die-

PERTINENT STATUTE, REGULATIONS, AND RULE

Pursuant to statute (War Risk Insurance Act of October 6, 1917, c. 105, sec. 402, 40 Stat. 409) and regulation (Bulletin No. 1, Treasury Department, Regulations & Procedure, United States Veterans' Bureau, Vol. II, pp. 1233–1237) the contract sued upon provided for payment to the insured of monthly benefits at the rate of $5.75 for each $1,000 of insurance in the event he became totally and permanently disabled while the insurance was in force.

Total permanent disability was defined by regulation (Treasury Decision No. 20, Regulations & Procedure, United States Veterans' Bureau, Vol. I, p. 9), pursuant to statutory authorization (Sec. 402, War Risk Insurance Act), as follows:

> Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed * * * to be total disability.
>
> Total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. * * *.

Rule 50 (b) of the Federal Rules of Civil Procedure for the District Courts of the United States provides:

> Whenever a motion for a directed verdict made at the close of all the evidence is

denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

STATEMENT

On November 20, 1936, petitioner, having been adjudged by a county probate court as mentally incompetent on December 9, 1935 (R. 4, 7–11), brought suit by his committee in the United States District Court for the Western District of South Carolina to recover benefits under a $10,000 con-

tates the disposition which the Court of Appeals has directed.

Petitioner in effect contends that, although not so recognized by this Court in *Baltimore & C. Line* v. *Redman, supra*, an essential step in the practice preserved by the Seventh Amendment is the reconsideration of the reserved question by the District Court, and, moreover, that this reconsideration must be invoked by a particular motion in order to satisfy the requirements of the Seventh Amendment. We submit, however, that this contention is without support in the decisions of this Court,[32] in historical analogy,[33] in logic.

Reconsideration by the District Court of a question once decided by it would appear no more an essential part of the practice under which the entry

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[32] *Baltimore & C. Line* v. *Redman*, 295 U. S. 654; *Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243.

Aetna Life Ins. Co. v. *Kennedy*, 301 U. S. 389, 394-395, relied upon by petitioner, was disposed of insofar as any question under the Federal Constitution was concerned, upon the ground that the court's ruling on the motion for a directed verdict had not been reserved. The significance of a motion for judgment notwithstanding the verdict was referred to only as part of the court's discussion of the procedure in the State of Pennsylvania, inapplicable in the Circuit Court of Appeals since, as stated in the opinion, "The Conformity Act does not extend to the Circuit Court of Appeals."

Cf. *Berry* v. *United States*, 111 F. (2d) 615 (C. C. A. 2), reversed on other grounds, 312 U. S. 450; *Conway* v. *O'Brien*, 111 F. (2d) 611 (C. C. A. 2), reversed on other grounds, 312 U. S. 492; *Limbershaft Sales Corp.* v. *A. G. Spalding & Bros.*, 111 F. (2d) 675, 678 (C. C. A. 2).

[33] See footnote 29, *supra*, p. 41.

of judgment n. o. v. is authorized, than is the concurrence of the District Court in the conclusion ultimately reached by a reviewing court. In any event, if reconsideration by the District Court be regarded as an essential step in the practice under which the entry of judgment n. o. v. is authorized by the Constitution, the mere form of motion by which such reconsideration is invoked is surely not an essential step in that practice.

III

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN EXCLUDING EVIDENCE AS TO PETITIONER'S CONDITION SUBSEQUENT TO THE PROBATE COURT ADJUDICATION THAT HE WAS INCOMPETENT AND IN CHARGING THAT HE WAS TOTALLY PERMANENTLY DISABLED AS A MATTER OF LAW ON AND AFTER THAT ADJUDICATION

Early in the trial the court announced that no evidence would be admitted as to petitioner's condition subsequent to December 9, 1935, when the county probate court adjudged him to be incompetent and appointed his wife as his committee (R. 7–11).

The court stated in effect that the admission of such evidence would constitute a collateral attack on a judgment which, the court ruled, could not properly be subjected to such an attack (R. 8). Further, the court charged the jury that they could not go beyond the judgment of the probate court and that, as a matter of law, petitioner was totally permanently disabled from that date (R. 41). Excep-

tion was taken both to the ruling on the evidence (R. 9, 10, 11) and the instruction (R. 42).

Assuming that the adjudication, which is not contained in the record, was an adjudication of insanity, we submit that the ruling and the instruction are contrary to the principle supported by the great weight of authority that an adjudication of insanity is not conclusive as against persons not parties or privies to the lunacy proceeding even as to the existence of insanity on the date of adjudication. *Cathcart* v. *Matthews*, 105 S. C 329; *Hall* v. *Aetna Life Ins. Co.*, 85 F. (2d) 447, 451 (C. C. A. 8th); *Viccioni* v. *United States*, 15 F. Supp. 547, 549–550 (D. C. R. I.), affirmed *Martinelli* v. *United States*, 101 F. (2d) 191 (C. C. A. 1st); *Chaloner* v. *New York Evening Post Co.*, 260 Fed. 335, 337 (D. C. N. Y.); *Johnson* v. *Pilot Life Ins. Co.*, 217 N. C. 139, 143. See also *Ramsey* v. *United States*, 61 F. (2d) 444 (C. C. A. 5th); *Boston Safe Deposit & Trust Co.* v. *Bacon*, 229 Mass. 585, 589; 7 A. L. R. 568, 597.

Moreover, even if the probate court adjudication were to be treated as conclusive evidence that petitioner was insane on the date of the adjudication, it may not be regarded as conclusive on the issue of total permanent disability. The insanity may readily have been recognized in the probate proceeding as limited to a single field of activity on the part of petitioner and, therefore, not totally disabling, or, if total, as temporary in nature and consequently not totally permanently disabling.

As stated in the opinion below, the instant case hinges upon the proof of a disability of mind "far more serious than that required to be proved in a proceeding before the probate court" (R. 56). Cf. *United States* v. *Kiles*, 70 F. (2d) 880 (C. C. A. 8th), and see *Conn. Mut. Life Ins. Co.* v. *Lathrop*, 111 U. S. 612, 620. Accordingly, it is submitted that ~~the court below was correct in stating that~~ the trial court's ruling upon the evidence and its instruction to the jury with respect to the adjudication of the probate court were erroneous.

It is further submitted that the ruling and the instruction were plainly prejudical to the Government since they relieved petitioner of the burden of establishing a substantial part of his case. For, without them, he would have been required to establish, *inter alia*, that his total disability continued to the date of the trial, November 30, 1939. *United States* v. *Spaulding*, 293 U. S. 498, 505, *supra*; *Poole* v. *United States*, 65 F. (2d) 795 (C. C. A. 4th), certiorari denied, 291 U. S. 658; *Personius* v. *United States*, 65 F. (2d) 646 (C. C. A. 9th).

The instruction was additionally prejudical since it advised the jury, in effect, that it could not consider the fact revealed by the testimony of petitioner's wife and Dr. Land, admitted despite the ruling, that petitioner was found mentally competent at a Government hospital as late as 1936, subsequent, of course, to the adjudication (R. 7, 26).

CONCLUSION

For the reasons stated it is respectfully submitted that the Circuit Court of Appeals properly held that the Government's motion for a directed verdict should have been granted and that the judgment of the Circuit Court of Appeals properly included a direction that judgment be entered in favor of the United States. However, if the judgment of the Circuit Court of Appeals should be reversed then the cause should be remanded for a new trial because of prejudicial errors committed by the trial court under its ruling on the evidence and in its charge to the jury.

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DECEMBER 1941.

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SUPREME COURT OF THE UNITED STATES.

No. 101.—October Term, 1941.

James H. Halliday, a Person non Compos Mentis, by his Committee, Annie Halliday, Petitioner,
vs.
United States of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[January 19, 1942.]

Mr. Justice Byrnes delivered the opinion of the Court.

This is a suit brought by the petitioner through his Committee on a $10,000 War Risk Insurance policy. The complaint alleged that petitioner had become permanently and totally disabled by April 2, 1919, the date on which he was honorably discharged by the Army. The insurance contract was in effect on that date and remained in effect until October 31, 1920. At the close of all the evidence the government's motion for a directed verdict was denied. The jury returned a verdict for petitioner and found that he had become permanently and totally disabled by April 2, 1919. The government moved for a new trial, the motion was denied, and judgment was entered on the verdict. On appeal the Circuit Court of Appeals reversed. It held that there was insufficient evidence to go to the jury and it remanded the case to the District Court with directions to set aside the verdict and to enter judgment in favor of the government.

Petitioner sought certiorari on two grounds: that the Circuit Court of Appeals had erred in holding that there was insufficient evidence for the jury; and that, even if the evidence was insufficient, under Rule 50(b) of the Rules of Civil Procedure[1] the Circuit

[1] "Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not

Court was without power to direct entry of judgment for the government without a new trial. We granted certiorari, as we had in *Berry* v. *United States*[2] and *Conway* v. *O'Brien*,[3] because of the importance of the question concerning Rule 50(b). However, as in those cases, we do not reach that problem since we are of the opinion that the evidence was sufficient to support the verdict.

The insurance contract, the Act of Congress which authorized it,[4] and the regulations issued pursuant to that Act[5] obliged petitioner to prove that he was permanently and totally disabled on or before October 31, 1920, the date of expiration of the contract. We think there was evidence from which, if believed, the jury could have drawn this conclusion.

Period prior to October 31, 1920. Petitioner appeared to his friends and neighbors as a normal and healthy young man before his induction into the Army on June 23, 1918. In August he sailed for France, and in September he injured his back and was admitted to camp hospital. From that time until his discharge, he was examined on several occasions by Army physicians. Their reports reveal that he was "very nervous" and that he gave "impressions of neurasthenia".

While much of the testimony was not specific as to time, several of the witnesses described the appearance and behavior of the petitioner immediately following his discharge in April, 1919. The jury was clearly warranted in regarding their testimony as applicable to the period during which the insurance policy remained in force.

Dr. J. N. Land, a general practitioner who had been "the family physician of the Halliday family" and who had known petitioner from infancy, testified that from 1919 on, petitioner was the victim of psychoneurosis and hypochrondria. These ills caused him to

returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

[2] 312 U. S. 450.

[3] 312 U. S. 492.

[4] War Risk Insurance Act of October 6, 1917, c. 105, § 402, 40 Stat. 409.

[5] Bulletin No. 1, Treasury Department, Regulations & Procedure, United States Veterans' Bureau, Volume II, pp. 1233-1237.

talk about himself constantly, to imagine the existence of symptoms, and to become very unfriendly and suspicious. The witness "would not have advised him to do any work since he has been out of the Army," and was of the opinion that work "would have been harmful to him" and would have resulted in "a complete collapse". At the time of his discharge from the Army, the doctor "didn't hold any hope for his recovery". The Circuit Court of Appeals considered this testimony of "little probative force", chiefly because of Dr. Land's admission that he had not examined petitioner professionally until about 1932. But the doctor testified that he had seen petitioner "on the streets or in a drugstore" "at least two or three times a year, possibly more • • • all the way from 1919." Petitioner talked to him "every chance he has got since 1919". In the course of these conversations petitioner would describe his condition at length and ask the witness to do something for him. While the Circuit Court may have regarded the probative force of this evidence as "little", it was clearly proper for the jury to conclude from it and from their understanding of small town life that these encounters and his earlier intimacy with the Halliday family afforded Dr. Land an opportunity to form a reliable estimate of petitioner's condition.

Other witnesses, including his wife and brothers and neighbors, testified that when he returned from the war petitioner "was suspicious of everybody," "didn't seem to be the same man," "seemed to be a man that didn't have a grip on himself," "didn't have the best control of himself." They described him as "a physical wreck," "nervous," "not right," "a complete physical and mental wreck, very badly torn up physically and mentally." And one brother testified that petitioner's condition upon his return was "practically the same as it is today."

Period following October 31, 1920. While it is true that total and permanent disability prior to the expiration of the insurance contract must be established, evidence as to petitioner's conduct and condition during the ensuing years is certainly relevant. It is a commonplace that one's state of mind is not always discernible in immediate events and appearances, and that its measurement must often await a slow unfolding. This difficulty of diagnosis and the essential charity of ordinary men may frequently combine to delay the frank recognition of a diseased mind. Moreover, the totality and particularly the permanence of the disability as of 1920 are sus-

ceptible of no better proof than that to be found in petitioner's personal history for the ensuing 15 years.[6]

Petitioner's wife testified that during this period he was unable to do a full day's work, that he threatened to commit suicide and to kill her and their children, and that he feared attempts to poison him. She stated that although they rented one farm and later bought but never paid for another, they hadn't "done any farming much" and had "just had little patches," and that she and hired hands had been responsible even for this limited enterprise. Dr. Land testified that the mental disorder had gradually progressed since the war.

The reports of government medical examiners and the records of government hospitals reveal a diagnosis of hypochondria on February 14, 1921. And on November 24, 1925 petitioner was found to be psychoneurotic and neurasthenic. On that date he informed the medical examiner that he was unable to work, that he lacked confidence, and that he was often depressed and seized by fear. He complained of "a great many things which physical examination fails to reveal." Reports of subsequent examinations up to and including April 11, 1935, contain similar information and diagnoses. Finally, on December 9, 1935, at the instance of Dr. Land, petitioner was adjudged incompetent by a county Probate Court and his wife was appointed as a committee to handle his affairs.

In support of its conclusion the Circuit Court of Appeals observed that "insured's failure to secure adequate hospitalization" leaves it "highly speculative whether insured's ailments, whatever these may have been, would not have been cured by the medical treatment which was in his potential grasp." There can be no doubt that evidence of the failure of attempted treatment would have been highly persuasive of the permanence of petitioner's disability. And the jury was entitled to draw inferences unfavorable to his claim from the absence of such evidence. However, this was but one of the many factors which the jury was free to consider in reaching its verdict. In the face of evidence of a mental disorder of more than 15 years duration, it can hardly be said that the absence of this single element of proof was fatal to petitioner's claim. Moreover, inferences from failure to seek hospitalization and treat-

[6] The trial judge instructed the jury: "All of this evidence as to his condition in later years, however, is to be considered by you for the purpose of determining whether the insured became in fact permanently and totally disabled on or before April 2, 1919, or before August, September, or October, 1920."

ment must be drawn with the utmost caution in cases of mental disorder, where, as here, there is reason to believe that one of the manifestations of the very sickness itself is fear and suspicion of hospitals and institutions.

Although it was unnecessary to its disposition of the case, the Circuit Court of Appeals considered and noted its agreement with the government's objection to the District Court's refusal to admit evidence of petitioner's condition subsequent to December 9, 1935, the date on which petitioner was adjudged incompetent by the county probate court.[7] We think that the District Court's ruling was erroneous, but there is nothing to show that it was seriously prejudicial to the government. Neither in the District Court nor in this Court has the government suggested its ability to produce evidence from the period subsequent to 1935 which would substantially alter the state of the record.

The case is remanded to permit the reinstatement of the judgment of the District Court.

Reversed.

Mr. Justice ROBERTS and Mr. Justice JACKSON took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

[7] The same ruling was embodied in the instructions to the jury.